Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5364

DARNELL BROWN

Petitioner,

—*v.*—

LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF LOUISIANA

PETITION FOR CERTIORARI FILED SEPTEMBER 17, 1979
CERTIORARI GRANTED DECEMBER 10, 1979

TABLE OF CONTENTS OF APPENDIX

	Page
Docket Entries	1
Bill of Information	4
Motion to Quash Jury	5
Assignment of Error No. 1 on Appeal	6
Decision of Louisiana Supreme Court	7
Order Denying Re-Hearing	10
Order of the Supreme Court of the United States Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari	11

DOCKET ENTRIES

For Defendant:

July 31, 1978 Minute Entry: Filed Bill of Information

August 2, 1978 Minute Entry: The defendant, accompanied by counsel John Lawrence, Esq., waived the readings of the information and pleaded not guilty, granted 10 days for pleadings. Pre-trial for 8/11/78, defendant remanded.

August 11, 1978 Minute Entry: Defendant appeared with counsel John Lawrence, Esq., specially fixed for trial on 8/23/78 and defendant remanded.

August 23, 1978 Minute Entry: Defendant accompanied by counsel Gene Fulghum Esq., placed at the bar for trial. Fred Harper Esq., and Tom Chester Esq., present for the State. The State filed written notice of intent to use confession serving defense counsel with a copy of said notice. Mr. Fulghum on behalf of defendant filed with the court a motion in Limine and a motion to quash, which motions were argued and submitted by both sides. The court DENIED both said motions and objections reserved by defense.

Both sides announced readiness for trial and the petty jury venire was brought into open court and from their number, the following named jurors, to wit: SHERILYN DONALDSON, PAUL ROSENTHAL SHRLEY FLEURY, KAY SABATHIER, THOMAS STULL and MRS. GEORGE BARACCO were regularly accepted, duly sworn and empanelled to serve as jurors in this case.

Motion of defense, all witnesses were placed before the bar and admonished by the court as to the law and then ordered sequestered.

Empanelling of the jury commenced at 12:30 P.M. and was concluded at 1:16 P.M.—CHALLENGES: STATE, 5—DEFENSE, 6. CAUSE, 0.

The clerk read the information to the jury.

Mr. Chester made the state's opening statement and Mr. Chester made the state's opening statement and Mr. Fulghum made an opening statement on behalf of defense. Motion of the state, Mrs. Kenella Dixon, Levertes Dorsch, Sgt. Ed Cloger, Off. Ronald Johnson and Off. Charles Brett were duly sworn by the clerk, testified on the part of the state and were cross-examined by the defense. The state introduced and the court ordered filed in evidence and exhibited to the jury, the following: six (6) photographs, S-1 thru S-6. Apair of gloves, S-7. An evidence tag, S-8. (objection of defense reserved to S-8 only.) THE STATE RESTS. Motion of defense, defendant Darnell Brown was duly sworn by the clerk, testified in his own behalf and was cross-examined by the state. DEFENSE RESTS. Mr. Chester argued for the state, Mr. Fulghum for the defense and Mr. Harper closed for the state. The court delivered its charge to the jury at 4:15 P.M. and at the close of its charge the court presented to the jury a written list of responsive verdicts. The jury retired to deliberate at 4:26 P.M. and returned in court at the hour of 5:30 P.M. with the following written verdict: "AUGUST 23, 1978, GUILTY AS CHARGED. (signed) THOMAS STULL, FOREMAN." The clerk read the verdict to the defendant. Motion of defense, jury polled by way of secret written ballot in accordance with law and the court found to be 5 to 1 and legal and the court ordered the verdict recorded and filed and the petty jury discharged from the case. Mr. Harper then filed a multiple bill against the defendant under R.S. 15:529.1—the court ordered sentencing and hearing on the multiple bill specially fixed for 8-30-78 and the defendant remanded without benefit of bail.

August 30, 1978 Minute Entry: Defendant appeared with counsel Gene Fulghum Esq. Defendant filed motion for a new trial which was argued and submitted by both sides and denied by the court and objection reserved by defense.

Defendant specifically waived 24 hour delay as authorized. Defendant filed motion to quash multiple bill, which was

argued and submitted by both sides and DENIED by the court and objection reserved by defense.

Defendant when waived the reading of the multiple bill and pleaded gulity as charged (triple offender) waived all delays.

The court sentenced defendant DARNELL BROWN to serve a term of twenty-two (22) years at hard labor custody of the department of corrections, credit for time served and court costs waived.

Mr. Fulghum subsequently re-appeared before the bar, some one (1) hour later and filed with court a motion for appeal which was granted by the court and made returnable on 10-30-78.

September 19, 1978 Minute Entry: John Lawrence Esq., appeared on behalf of the defendant and filed with the court Assignments of Errors and Designation of Record for Appeal.

PARISH OF ORLEANS
CRIMINAL DISTRICT COURT
FOR THE PARISH OF ORLEANS

THE STATE OF LOUSIANA

v.

JOSEPH JOHNSON

ASSISTANT DISTRICT ATTORNEY for the Parish of Orleans, who in the name and by the authority of the said State, prosecutes, in this behalf, in proper person comes into the Criminal District Court for the Parish of Orleans, in the Parish of Orleans, and gives the said Court here to understand and be informed that one Darnell Brown late of the Parish of Orleans, on the 20th day of July in the year of our Lord, one thousand nine hundred and seventy-eight in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans, committed simple burglary of the building and structure No. 2930 Florida Street, belonging to one Cornella Dixon, with the intent to commit a theft therein, contrary to the form of the Statute of the State of Louisiana in such case made and provided and against the peace and dignity of the same.

EMERY VOORHIES
Assistant District Attorney
for the Parish of Orleans

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

Number 265-832 Section "F"

STATE OF LOUISIANA

versus

DARNELL BROWN

MOTION TO QUASH

And now into Court through undersigned counsel, comes Darnell Brown and moves the Court for an order quashing the Petit Jury of six and requiring a Petit Jury of Twelve or in the alternative an unanimous verdict of the Petit Jury of six, for the reason that:

Defendant's due process rights under the Sixth and the Fourteenth Amendments to the United States Constitution as enunciated in *Ballew* v. *Georgia*, 98 S.Ct. 1029 (1978) will be violated by a less than unanimous vote by a six person jury. Both the Louisiana Constitution and the Code of Criminal Procedure Art. 782 specify that the offense of Simple Burglary will be tried by a Jury of six, five of whom must concur in a verdict. As *Ballew*, *Supra*, held that a five person Jury was unconstitutional, a six person Jury with less than a unanimous verdict must also be unconstitutional.

Respectfully submitted,

BERNARD E. FULGHUM, JR.
Attorney for Defendant
ORLEANS INDIGENT DEFENDER PROGRAM
2700 Tulane Avenue, Room 112
New Orleans, Louisiana 70119

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

Number 265-832 Section "F"

STATE OF LOUISIANA

versus

DARNELL BROWN

ASSIGNMENT OF ERRORS AND
DESIGNATION OF RECORD FOR APPEAL

TO THE HONORABLE OLIVER SCHULINGKAMP, JUDGE, SECTION "F".

MAY IT PLEASE THE COURT:

Defendant, Darnell Brown, through his undersigned counsel, pursuant to C.Cr.P., Article 844 and 845 respectfully designates the following errors to be urged upon the appeal of the above numbered and entitled matter, and designates the record for same.

ASSIGNMENT OF ERROR NO. 1

Prior to trial, counsel for defendant filed a Motion to Quash the petit jury on grounds that the defendant's due process rights under the Sixth and Fourteenth Amendments were violated by a less than unanimous vote by a six person jury and that defendant was entitled to a twelve person jury (*Ballew* v. *Georgia*, 98 S.Ct. 1029 (1978) (Tr. page 1 lines 7-18). Defendant objected to the court's ruling overruling the Motion to Quash.

SUPREME COURT OF LOUSIANA

Number 63,171

May 21, 1979

STATE OF LOUISIANA

vs.

DARNELL BROWN

APPEAL FROM THE CRIMINAL DISTRICT COURT, SECTION "F", PARISH OF ORLEANS, HONORABLE OLIVER P. SCHULINGKAMP, PRESIDING JUDGE.

* * * *

BALNCHE, Justice.

Defendant, Darnell Brown, was charged by bill of information with simple burglary in violation of LSA-R.S. 14:62. On August 23, 1978, after trial before a jury of six persons, defendant was found guilty as charged, the verdict being five to one. Thereafter, the State filed a bill of information pursuant to LSA-R.S. 15:529.1 charging defendant as a third felony offender. At the multiple offender hearing defendant pled guilty and was sentenced as an habitual offender to serve twenty-two years at hard labor in the custody of the Department of Corrections.

Defendant has assigned ten errors as the basis for his appeal before this Court.

In July, 1978, Levertes Dorsch and her daughter, Kenella Dixon, were living respectively at 2930 and 2932 Florida Avenue, a double shotgun house located in New Orleans. On the morning of July 20, 1978, Ms. Dixon took her mother to work and then stopped to pick up some things at the supermarket. After she returned home at about 10:00 a.m., she heard noises which sounded like footsteps from her mother's side of the double. After a brief investigation outside during which she observed that a back window had been broken open, she called the

police. Defendant was discovered inside Ms. Dorsch's residence by the law enforcement officers. He had been packing various items in the house, including cameras, radio, television, et cetera, into boxes and pillow cases. Defendant was arrested and subsequently charged with simple burglary.

Before the trial court, ten assignments of error were filed on behalf of defendant. In brief, no argument has been presented relative to assignments of error numbers three and eight, and they are considered abandoned. *State* v. *Edwards*, 261 La. 1014, 261 So.2d 649 (1972).

ASSIGNMENT NO. 1

By this assignment, defendant argues that the trial court erred in denying defendant's motion to quash the petit jury on the grounds that his due process rights were violated by statutory provisions permitting less than a unanimous vote by a jury of only six persons.

On April 17, 1979, the United States Supreme Court in *Burch* v. *Louisiana*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (1979), held:

> ". . . [W]e believe that conviction by a nonunanimous six-member jury in a state criminal trial for a nonpetty offense deprives an accused of his constitutional right to trial by jury."

In holding unconstitutional that portion of Article 1, § 17 of the Louisiana Constitution of 1974 which provides "a case in which the punishment may be confinement without hard labor for more than six months shall be before a jury of six persons, five of whom must concur to render a verdict," the Court reasoned:

> "We thus have held that the Constitution permits juries of less than 12 members, but that it requires at least six. [Citations omitted] And we have approved the use of certain nonunanimous verdicts in cases involving 12-person juries. [Citations omitted] . . . But having already departed from the strictly historical requirements of jury trial, it is inevitable

> that lines must be drawn somewhere if the substance of the jury trial right is to be preserved. . . .
>
> . . . .
>
> ". . . [M]uch the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude not that conviction for a nonpetty offense by only five members of six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous. . . ."

The question presented in this assignment is whether *Burch, supra,* is to be applied retroactively. We think not.

Our review of decisions by the United States Supreme Court in other closely related areas leads us to the conclusion that the rule of *Burch, supra,* should *not* be applied retroactively to juries empaneled prior to the date of the *Burch* decision. See *Hankerson* v. *North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977); *Daniel* v. *Louisiana*, 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975); *DeStefano* v. *Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968); *State* v. *Robinson*, 361 So.2d 864 (La. 1978).

Since at the time of the commission of the instant offense and the defendant's conviction, Louisiana law authorized trial by jury composed of six persons, five of whom were required to concur in order to render a verdict in cases where the punishment may be confined at hard labor or confinement without hard labor for more than six months, Article 1, § 17 of the Louisiana Constitution of 1974, defendant's conviction by such a jury is valid.

This assignment is, therefore, without merit.

SUPREME COURT OF LOUSIANA

No. 63,171

June 25, 1979

STATE OF LOUISIANA

versus

DARNELL BROWN

ON APPEAL FROM THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, HONORABLE OLIVER P. SCHULINGKAMP, JUDGE PRESIDING

ON APPLICATION FOR REHEARING

Denied.

Denied.

FWS
AT JR
JAD
PFC
WFM
JLD
FAB

SUPREME COURT OF THE UNITED STATES

No. 79-5364

DARNELL BROWN, PETITIONER

v.

LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 10, 1979

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